

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: WEBKINZ ANTITRUST
LITIGATION

No. M 08-01987 JSW

**ORDER GRANTING MOTION TO
DISMISS**

Now before the Court is the motion to dismiss counts one, two, part of five, and seven of the Plaintiffs' consolidated amended class action complaint filed by Defendants Ganz, Inc. and Ganz U.S.A., LLC ("Ganz"). Ganz brings this motion to dismiss: (1) the first count for violation of the antitrust laws; (2) the second count under California's Unfair Competition Law; (3) the fifth count under Illinois' Consumer Fraud Act or a claim for damages under the Deceptive Practices Act; and (4) the seventh count under New York's General Business Law §§ 349 *et seq.*, all for failure to state a claim upon which relief can be granted. Having carefully considered the parties' arguments and relevant legal authority, the Court hereby GRANTS Ganz's motions to dismiss with leave to amend.

BACKGROUND

Ganz develops and distributes toys and other products, including Webkinz, a popular toy linked to an interactive web site. Associated with each Webkinz toy is a code that enables the

1 user to unlock a web site, called Webkinz World, that offers online games and other activities,
2 allowing the user to take care of a virtual pet by earning points by playing games, which can be
3 used to buy food, houses, and other items. The code is valid for one year, after which the user
4 must purchase another Webkinz to continue to have access to the Webkinz World.
5 (Consolidated Amended Class Action Complaint (“Compl.”) at ¶ 3.)

6 This action arises from alleged illegal acts by Ganz in “(a) conditioning the sale of
7 Webkinz (the ‘tying product’) on the purchase of unrelated Ganz products from the tied product
8 markets (the ‘tied Ganz products’) and (b) Defendants’ practice of taking orders for Webkinz,
9 which they have no intent to, and do not, deliver in a reasonably timely manner.” (*Id.* at ¶ 2.)
10 According to the complaint, Ganz initially sold Webkinz through its established network of
11 small retailers and gift shops. When Ganz first introduced the product the marketplace, it had
12 no special requirements for purchase, but shortly afterward, began to require that retailers
13 purchase unrelated products from Ganz’s “core product line” before they could purchase
14 Webkinz or Webkinz-related merchandise. (*Id.* at ¶ 5.) In addition to the co-purchasing
15 requirement, Ganz created a Loyalty Program for Webkinz retailers giving priority shipping for
16 ordering more than specific levels of core products (the non-Webkinz, or tied Ganz products)
17 within a twelve-month period. (*Id.* at ¶ 7.)

18 On the basis of these allegations, Plaintiffs assert causes of action for violation of the
19 Sherman Act § 1 and the Clayton Act § 3, as well as claims for violation of the consumer
20 protection statutes in California, Connecticut, Florida, Illinois, Massachusetts and New York.
21 All claims have been consolidated in this multi-district litigation.

22 The Court will address additional facts as necessary in the remainder of this order.

23 ANALYSIS

24 A. Legal Standard Applicable to Motion to Dismiss.

25 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the
26 pleadings fail to state a claim upon which relief can be granted. The complaint is construed in
27 the light most favorable to the non-moving party and all material allegations in the complaint
28 are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The court,

1 however, is not required to accept legal conclusions cast in the form of factual allegations, if
2 those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness*
3 *Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286
4 (1986)). Conclusory allegations without more are insufficient to defeat a motion to dismiss for
5 failure to state a claim upon which relief may be granted. *McGlinchy v. Shell Chemical Co.*,
6 845 F.2d 802, 810 (9th Cir. 1988). Even under the liberal pleading standard of Federal Rule of
7 Civil Procedure 8(a)(2), a plaintiff must do more than recite the elements of the claim and must
8 “provide the grounds of [its] entitlement to relief.” *Bell Atlantic v. Twombly*, 127 S. Ct. 1955,
9 1959 (2007) (citations omitted). In addition, the pleading must not merely allege conduct that is
10 conceivable, but it must also be plausible. *Id.* at 1974.

11 **B. Plaintiffs’ Antitrust Cause of Action.**

12 Tying arrangements are traditionally defined as “an agreement by a party [the seller] to
13 sell one product but only on the condition that the buyer also purchases a different (or tied)
14 product, or at least agrees that he will not purchase that product from any other supplier.”
15 *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-62 (1992). In order to
16 prevail on a traditional tying claim, a plaintiff must plead and prove: (1) that there exist two
17 distinct products or services in different markets whose sales are tied together; (2) that the seller
18 possesses appreciable economic power in the tying product market sufficient to coerce
19 acceptance of the tied product; and (3) that the tying arrangement affects a not insubstantial
20 volume of commerce in the tied product market. *See Paladin Associates, Inc. v. Montana*
21 *Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003) (citing *Eastman Kodak*, 504 U.S. at 461-62
22 (quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958))).

23 Defendant moves to dismiss the antitrust cause of action on the basis that Plaintiffs fail
24 to define a relevant market and fail to allege a valid antitrust injury. The Court shall address
25 each argument in turn.

26 **1. Defining the Relevant Tied Product Market.**

27 In order to prevail on their antitrust claims of illegal tying, Plaintiffs must establish the
28 relevant markets in which to evaluate Webkinz’s alleged market power. *See County of*

1 *Tuolumne v. Sonora Community Hospital*, 236 F.3d 1148, 1157-58 (9th Cir. 2001). In other
2 words, in order to state a valid antitrust claim under the Sherman Act, a plaintiff must allege
3 that the defendant has market power within a “relevant market.” The “plaintiff must allege both
4 that a ‘relevant market’ exists and that the defendant has power within that market.” *Newcal*
5 *Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044 (9th Cir. 2008). There is no
6 requirement that these elements of an antitrust claim be pled with specificity. *Id.* at 1045 (citing
7 *Cost Mgmt. Servs. v. Washington Natural Gas Co.*, 99 F.3d 937, 950 (9th Cir. 1996)). An
8 antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face
9 of the complaint that the alleged market suffers from a fatal legal defect. *Id.* Accordingly,
10 because “the validity of the ‘relevant market’ is typically a factual element rather than a legal
11 element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by
12 summary judgment or trial.” *Id.* (citing *High Technology Careers v. San Jose Mercury News*,
13 996 F.2d 987, 990 (9th Cir. 1993) (holding that the market definition depends on a “factual
14 inquiry into the ‘commercial realities’ faced by consumers”) (quotations omitted)).

15 However, a complaint may be dismissed pursuant to Rule 12(b)(6) “if the complaint’s
16 ‘relevant market’ definition is facially unsustainable.” *Id.* (citing *Queen City Pizza, Inc. v.*
17 *Domino’s Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997)). The relevant market must be a
18 product market, whose boundaries are defined not by the consumers but by the products or
19 producers themselves. *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962). Second, the
20 market must encompass the product at issue as well as all economic substitutes for the product.
21 *Id.* “The outer boundaries of a product market are determined by the reasonable
22 interchangeability of use or the cross-elasticity of demand between the product itself and
23 substitutes for it.” *Id.* The relevant market must include “the group or groups of sellers or
24 producers who have actual or potential ability to deprive each other of significant levels of
25 business.” *Thurman Industries, Inc. v. Pay ‘N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir.
26 1989).

27 “A product market includes the product at issue and its substitutes,” and requires the
28 Court to consider whether two products are reasonably interchangeable. *Independent Ink, Inc.*

1 *v. Trident, Inc.*, 210 F. Supp. 2d 1155, 1168 (C.D. Cal. 2002) (citing, *inter alia*, *Brown Shoe*,
2 370 U.S. at 325). The focus of this inquiry is the product's "price, use and qualities." *United*
3 *States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004) (quoting *United States v.*
4 *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956)). Using these factors, products may
5 be considered "reasonably interchangeable," where there is cross-elasticity of demand, *i.e.* if
6 customers would switch to alternatives in response to a price increase in the alleged
7 monopolist's product. *Rebel Oil, Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir.
8 1995); *see also AD/SAT, A Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d
9 Cir. 1999) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)) ("Cross elasticity
10 of demand exists if consumers would respond to a slight increase in the product of one product
11 by switching to another product.").

12 Third, it is legally permissible to premise antitrust allegations on a submarket, whereby
13 the antitrust plaintiff alleges restraint of trade within or monopolization of a small part of the
14 general market of substitutable products. *Newcal Industries*, 513 F.3d at 1045. "In order to
15 establish the existence of a legally cognizable submarket, the plaintiff must be able to show (but
16 need not necessarily establish in the complaint) that the alleged submarket is economically
17 distinct from the general product market." *Id.* There are several "practical indicia" of an
18 economically distinct submarket: "industry or public recognition of the submarket as a separate
19 economic entity, the product's peculiar characteristics and uses, unique production facilities,
20 distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."
21 *Brown Shoe*, 370 U.S. at 325.

22 In the consolidated amended complaint, Plaintiffs set out four submarkets that they
23 contend Ganz's core line of tied products fall within: (1) the "Plush market" which is "a distinct
24 submarket within the general toy market" comprising "plush toys that do not have an online
25 gaming component"; (2) the "Souvenirs and Novelties market" which consists of "items [in]
26 souvenir and novelty shops that are designed and manufactured to be bought and/or given as
27 gifts for personal reasons or special events"; (3) the "Home Decorative Accessories market"
28 which consists of "products designed and manufactured to be bought to decorate the interior of

1 a home [such as] picture frames, tableware, and ceramics”; and (4) the “Seasonal Decorations
2 market” which consists of “products designed and manufactured to be bought for holidays, such
3 as Christmas and Thanksgiving [such as] ornaments, decorations, and keepsakes.” (Compl. at
4 ¶¶ 81, 83, 84, 85.)

5 In the complaint, Plaintiffs allege that the submarkets are sufficiently distinct from other
6 product markets and that the relevant industry recognizes these markets as submarkets within
7 the more general market of substitutable products. (*See id.* at ¶¶ 81-85.) In *Station Enterprises,*
8 *Inc. v. Ganz, Inc.*, 2009 WL 2926572, *7 (E.D. Mich. Sept. 10, 2009), decided at summary
9 judgment on other grounds, the district court implicitly accepted the very same product market
10 definitions. “On a motion to dismiss, the court need not engage in extensive analyses of
11 reasonable interchangeability and cross elasticity of demand.” *Bansavich v. McLane Co.*, 2008
12 WL 4821320, *3 (D. Conn. Oct. 31, 2008) (citations omitted); *see also Newcal Industries*, 513
13 F.3d at 1045 (holding that the validity of the relevant market is typically a factual rather than a
14 legal analysis). At this procedural stage and as currently pled, the Court does not find
15 Plaintiff’s submarket definitions to be “facially unsustainable” and does not grant the motion to
16 dismiss on this ground. *See Newcal Industries*, 513 F.3d at 1045; *see also Delano Farms Co. v.*
17 *California Table Grape Commission*, 623 F. Supp. 2d 1144, 1176-77 (E.D. Cal. 2009) (holding
18 that market definition is a “deeply fact-intensive” inquiry and that it is not appropriate to “delve
19 into a factual inquiry” on effective substitutes on a motion to dismiss).

20 **2. Plaintiffs Do Not Allege Anticompetitive Effect in Tied Market.**

21 Although the Court finds that, on the basis of the allegations in the complaint, the tied
22 submarkets are not facially unsustainable, Plaintiffs do not sufficiently allege anticompetitive
23 effect in those alleged tied markets. Plaintiffs must plead a “pernicious effect on competition
24 and lack of ... any redeeming value.” *In re eBay Seller Antitrust Litig.*, 545 F. Supp. 2d 1027,
25 1033-34 (N.D. Cal. 2008) (citing *Northern Pacific Ry. Co. v. United States*, 365 U.S. 1, 5
26 (1958)). In order to make out a cognizable claim for anticompetitive tying, “[t]he injury is
27 reduced competition in the market for the tied product.” *Rick-Mik Enters. v. Equilon Enters.,*
28 *LLC*, 532 F.3d 963, 971 (9th Cir. 2008). As the Supreme Court has stated, “the justification for

1 the challenge [against ties] rested on either an assumption or a showing that the defendant's
2 position of power in the market for the tying product was being used to restrain competition in
3 the market for the tied product." *Id.* at 971 (citing *Illinois Tool Works Inc. v. Independent Ink,*
4 *Inc.*, 547 U.S. 28, 34 (2006)). "Thus, 'in all cases involving a tying arrangement, the plaintiff
5 must prove that the defendant has market power in the tying product.' And to prove it, it must
6 first be properly alleged." *Rick-Mik*, 532 F.3d at 971-72 (citing *Illinois Tool Works Inc.*, 547
7 U.S. at 46).

8 In the consolidated complaint, Plaintiffs allege that as a result of Ganz's practice of
9 requiring retailers to purchase from their core line of products when placing orders for the
10 Webkinz products the plaintiff retailers are unable to purchase those same type of products from
11 other producers – Ganz's competitors – and are therefore unable to provide those choices to
12 consumers. However, the complaint does not allege that consumers are unable to purchase the
13 competing manufacturers' products from other retailers.

14 This case is readily distinguishable from the central case relied upon by Plaintiffs, *In re*
15 *Hypodermic Products Antitrust Litig.*, 2007 WL 1959224 (D.N.J. June 29, 2007). In
16 *Hypodermic Products*, plaintiffs alleged that the dominant manufacturer of hypodermic needles
17 and medical products engaged in exclusionary practices that constrained the purchasing ability
18 of the end users of the products – hospitals and other health care providers. *Id.* at *1-3. The
19 complaint also asserted that, as a result of the anticompetitive behavior of the dominant
20 manufacturer, actual or potential competitors were not able to increase their market share
21 sufficiently to achieve economies of scale, resulting in lower costs and therefore higher prices
22 to end users on a marketwide basis. *Id.* at *4. Here, the allegation is that there is a restriction
23 on retailers or dealers, not on end users or consumers. There is no inference that competing
24 manufacturers of the core product lines are excluded or injured by consumers being unable to
25 purchase their products. There is no allegation or necessary inference that competing sellers
26 have been foreclosed from carrying competing products or that consumers are not able to have
27 access to the tied products markets. There is no allegation that Ganz dominates the tied product
28 submarkets and no inference or allegation that prices, output or general market competition has

1 been affected by Ganz's alleged exclusionary practices. The only allegation of injury is that
2 Plaintiffs, particular retailers with limited shelf space, are unable to stock competing products.¹

3 **3. Claim of Antitrust Injury.**

4 Only individuals who possess antitrust standing by virtue of having suffered such injury
5 may sue to redress an antitrust violation. *Associated General Contractors of California, Inc. v.*
6 *California State Council of Carpenters*, 459 U.S. 519, 529-535 (1983); *see also Cargill, Inc. v.*
7 *Monfort of Colorado, Inc.*, 479 U.S. 103, 113 (1986) ("a private plaintiff must allege threatened
8 loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that
9 which makes defendants' acts unlawful.'") (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat,*
10 *Inc.*, 429 U.S. 477, 497 (1977)). In order to survive a motion to dismiss under Rule 12(b)(6),
11 "an antitrust complaint 'need only allege sufficient facts from which the court can discern the
12 elements of an injury resulting from an act forbidden by the antitrust laws.'" *Cost Mgmt.*
13 *Servs.*, 99 F.3d at 950 (citing *Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir.
14 1987)). "Where the defendant's conduct harms the plaintiff without adversely affecting
15 competition generally, there is no antitrust injury." *Paladin Assocs., Inc. v. Montana Power*
16 *Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003). In order to state a claim under Section 1 of the
17 Sherman Act, the plaintiff must allege injury to competition generally, not merely to
18 competitors. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 734 (9th Cir.
19 1987) (affirming dismissal of antitrust action and holding that "[w]hile appellant clearly pleads
20 injury to itself, its conclusion that competition has been harmed thereby does not follow.")

21 Plaintiffs repeatedly assert that they were harmed because they were unable to stock
22 their stores' shelves with other competing products from the tied submarkets. (*See, e.g., Compl.*
23 *at* ¶¶ 5, 12, 15, 30-36, 91, 95, 97.) Plaintiffs' claimed injury is the money they spent on tied

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25 ¹ Plaintiffs argue in their opposition that the "Complaint's anticompetitive allegations
26 are clear, and affect the tying and the tied markets. The harm in the tying product caused by
27 Defendants' acts is, like the tied product markets, one that affects a substantial volume of
28 commerce, resulting in higher prices and restricted output affecting consumers." (Opp. Br. at
12.) This is stated as a legal conclusion in the motion briefing. However, the effect of
increased prices or restricted output is not actually supported by any facts currently alleged
in the complaint. For this reason, the Court grants Plaintiffs leave to amend their complaint
to set out such facts, if available.

1 products as a condition for purchasing the Webkinz products. However, that expenditure is the
2 result not of foreclosed business opportunities in the tied markets, but from Plaintiffs' efforts to
3 maximize their profits in the tying market, by satisfying consumer demand for the Webkinz
4 products. Plaintiffs do not allege that Ganz's conduct has in any way affected the price of the
5 tied products or even the overall price for the bundled goods. The injury currently alleged by
6 Plaintiffs does not amount to recognizable harm to competition. *See Rutman Wine*, 829 F.2d at
7 734 ("[w]hile appellant clearly pleads injury to itself, its conclusion that competition has been
8 harmed thereby does not follow.")

9 Plaintiffs merely state that the conduct by Ganz caused harm to competition generally,
10 but do not allege specific facts supporting such conclusory legal claims. (*See, e.g.*, Compl. at ¶¶
11 12, 89, 97.) In affirming the district court's dismissal of a Sherman Act Section 1 claim for
12 failure sufficiently to allege an unreasonable restraint of or injury to competition, the Ninth
13 Circuit held that "[i]n order successfully to allege injury to competition, a section one claimant
14 may not merely recite the bare legal conclusion that competition has been restrained
15 unreasonably. Rather, a claimant must, at a minimum, sketch the outline of the antitrust
16 violation with allegations of supporting factual detail." *Les Shockley Racing, Inc. v. National*
17 *Hot Rod Ass'n*, 884 F.2d 504, 507-08 (9th Cir. 1989) (citing *Rutman Wine*, 829 F.2d at 736).

18 Plaintiffs summarily assert that consumers have been harmed, but do not allege facts
19 demonstrating that consumers have suffered any injury as a result of limited choices of the tied
20 products in Plaintiffs' stores. On behalf of actual consumers, Plaintiffs merely plead that

21 the illegal tying arrangement caused harm to consumer-purchasers of Plaintiffs'
22 customers by reducing consumer choices of products. The tying arrangement
23 forced Plaintiffs and other members of the class to spend limited financial
resources on unwanted "core" product rather than more popular products offered
by Ganz competitors and fill their limited shelf space with unwanted product.

24 (Compl. at ¶¶ 97, 117; 14 ("Defendants' actions have caused injury to the ultimate
25 consumer/purchasers of Plaintiffs' products by reducing the choices available to them."); 120
26 ("Ganz' tying arrangement has limited consumer choice.")) Conclusory allegations of
27 anticompetitive effect are insufficient without supporting facts as to how competition in the tied
28 markets has actually been reduced or harmed. Plaintiffs' factual allegations do not support the

1 contention that the availability of competitive products to consumers was significantly reduced
2 in the four large submarkets – the Plush market, the Souvenirs and Novelties market, the Home
3 Decorative Accessories market, and the Seasonal Decorations market – merely because
4 consumers were limited in their selection of some of those products on specific Plaintiffs’ store
5 shelves. There is no factual allegation to support the contention that there was a lack of choice
6 in the large four submarkets for *consumers*; there is merely an allegation that *Plaintiffs’* choices
7 of products within those markets with which to stock their limited shelf space, was restricted.
8 *See, e.g., Bansavich*, 2008 WL 4821320 at *4 (dismissing claim where “complaint set forth
9 allegation supportive of an injury to plaintiff’s business, but antitrust injury must represent an
10 adverse effect on competition as a whole in the relevant market rather than to plaintiff.”). As
11 there is no specific factual allegations regarding the alleged injury suffered by consumers or
12 competition in the tied markets generally, the Court GRANTS Defendants’ motion to dismiss
13 with leave to amend.

14 **C. Plaintiffs’ State Law Causes of Action.**

15 **1. Count Two Under California’s Unfair Competition Law.**

16 Plaintiffs assert a violation of California’s Unfair Competition Law, California Business
17 and Professions Code §§ 17200 *et seq.* (“UCL”), by alleging that Ganz’s failure to deliver
18 Webkinz products in a “reasonably timely manner” constituted an “unfair” and “fraudulent”
19 business practice. (*See* Compl. at ¶ 125.) Ganz moves to dismiss Plaintiffs’ second count on
20 the basis that Plaintiffs are neither consumers nor competitors of Ganz, but rather are retail
21 businesses that contracted to purchase Ganz products and merely claim that the delivery of the
22 merchandise was not timely. Although, for the most part,² Plaintiffs do not allege a breach of
23 contract, Ganz contends that the claim relating to late delivery is essentially a breach of each of
24 the Plaintiff members’ contracts with Ganz and California law does not encompass such
25 business-to-business contract claims. *See Linear Tech. Corp. v. Applied Materials, Inc.*, 61 Cal.

26
27 ² With the exception of Plaintiff in *Comstock v. Ganz, Inc.*, C 08-5106 JSW,
28 consolidated with this matter, Plaintiff members do not allege a breach of contract. Ganz
contends, however, that the unfair competition claims are “fundamentally contractual in
nature.” (Reply at 16.)

1 App. 4th 115, 135 (2007) (“[W]here a UCL action is based on contract not involving either the
2 public in general or individual consumers who are parties to the contract, a corporate plaintiff
3 may not rely on the UCL for the relief it seeks”); *see also Rosenbluth International, Inc. v.*
4 *Superior Court*, 101 Cal. App. 4th 1073, 1077 (2002) (holding that “a UCL action based on a
5 contract is not appropriate where the public in general is not harmed by the defendant’s alleged
6 unlawful practices.”).

7 In response, Plaintiffs contend that the standing requirement under the UCL is satisfied
8 here because the *Linear Tech* and *Rosenbluth* cases are readily distinguishable based on the
9 large size and sophistication of the litigants in those matters who were powerful and
10 sophisticated plaintiffs unlike the small mom and pop merchants here who were “victimized by
11 a pernicious and illegal scheme.” (Opp. Br. at 20; citing *In re Yahoo! Litigation*, 251 F.R.D.
12 459, 475 (C.D. Cal. 2008) (distinguishing *Linear Tech* and *Rosenbluth* on the basis that
13 plaintiffs in those cases were sophisticated businesses and individually capable of seeking relief
14 for their injuries).)

15 The Court finds that the central issue presented under California law is whether the
16 public at large, or consumers generally, are affected by the alleged unlawful business practice of
17 defendants. The relative size of the plaintiff companies and whether or not there is a contract
18 for the plaintiffs to rely upon is secondary to the analysis of whether, as a result of the alleged
19 unfair or fraudulent business practice, consumers are adversely affected. The California UCL
20 grants standing to companies of varying size, to defend the rights of the general consuming
21 public against unfair and fraudulent business practices. Similar to the analysis below on the
22 basis of Illinois and New York state law, the claim under California’s UCL as currently pled is
23 invalid as it fails to state a connection to the protection of the general public. The second count
24 pleads harm only to the Plaintiffs and Class members and alleges only that the conduct has a
25 tendency to cause injury to their business interests under the contracts each plaintiff presumably
26 has with Ganz. The allegations of the current complaint fundamentally sound in contract and
27 do not allege facts sufficient to demonstrate a connection to the protection of the public. The
28 Court finds the allegations to be insufficient to establish the requisite public or individual

1 consumer interest as required under California law. Accordingly, the motion to dismiss count
2 two under California's Unfair Competition Law is GRANTED with leave to amend to set out
3 the requisite factual connection to the general public or to individual consumer's interest.

4 **2. Count Five Under Illinois Consumer Fraud Act and Damages Under the**
5 **Deceptive Practices Act.**

6 Ganz moves to dismiss the part of Plaintiffs' fifth count under the Illinois Consumer
7 Fraud and Deceptive Practices Act, 815 Ill. Comp. Stat. Ann 505/1 *et seq.* ("Illinois Consumer
8 Fraud Act"), on the basis that the transactions at issue are beyond the scope of the statute
9 because they are business-to-business transactions and do not implicate consumer protection
concerns.

10 The elements of a claim under the Illinois Consumer Fraud Act are: "(1) a deceptive act
11 or practice; (2) an intent by defendants that the plaintiff rel[y] on the deception; and (3) that the
12 deception occurred in the course of conduct involving a trade and commerce." *In re Albergo*,
13 656 N.E.2d 97, 105 (Ill. 1995). Further, a "complaint alleging a violation of consumer fraud
14 must be pled with the same particularity and specificity as that required under common law
15 fraud." *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1996). Also, as "its name
16 indicates, the Consumer Fraud Act is primarily concerned with protecting consumers."
17 *Industrial Specialty Chems. v. Cummins Engine Co.*, 902 F. Supp. 805, 811 (N.D. Ill. 1995).
18 Under the Act, a "consumer" is defined as one "who purchases or contracts for the purchase of
19 merchandise not for resale in the ordinary course of his trade or business but for his use or that
20 of a member of his household." 815 Ill. Comp. Stat. 505/1(e). Plaintiffs bringing a claim under
21 the Act need not be consumers, but the Act does not authorize a suit by a non-consumer where
22 there is no injury to consumers. Although those bringing Consumer Fraud Act claims need not
23 be consumers, they must allege "a sufficient consumer protection nexus." *Nakajima All Co. v.*
24 *SL Ventures, Corp.*, 2001 WL 641415, *4 (N.D. Ill. June 4, 2001).

25 Again, for the reasons explained above, the Court finds that Plaintiffs' allegations
26 regarding the practices affecting consumer choice are unpersuasive. In addition, the allegations
27 in the complaint regarding the restrictions on consumer choice focus on the alleged tying
28 arrangement and not on the delays in delivery which form the basis of Plaintiffs' claims under

1 the Consumer Fraud Act. (*See* Compl. at ¶¶ 12-15, 96-97.) Plaintiffs do not make the
2 allegation that Ganz’s conduct in late deliveries made the Webkinz product any less available to
3 consumers. In fact, Plaintiffs contend that those products were instead sold at mass
4 merchandisers such as Target or Wal-Mart, instead of by the small shops like those operated by
5 Plaintiffs. (*See id.* at ¶¶ 101, 107.) The only relevant contention that the delays in delivery
6 affect consumers are stated as legal conclusions, without supporting facts. (*See id.* at ¶ 149
7 (“Defendants’ general course of conduct had an impact on the public interest because the acts
8 were part of a generalized course of conduct affecting numerous consumers. Defendants’
9 practices were consumer oriented and also directed to the market generally or implicated
10 consumer protection concerns.”) The Court finds such conclusory allegations to be insufficient
11 to set out the requisite consumer protection nexus as required under Illinois law. Accordingly,
12 the motion to dismiss the claim under the Illinois Consumer Fraud Act is GRANTED with leave
13 to amend to establish a sufficient factual predicate supporting a consumer protection nexus.

14 In addition, Plaintiffs are not entitled to damages under Illinois’ Deceptive Practices Act
15 and any such claim for money damages is dismissed. *See Greenberg v. United Airlines*, 206 Ill.
16 App. 3d 40, 45-46 (1990). Both parties agree that only injunctive relief is available under this
17 statute.

18 3. Count Seven Under New York General Business Law.

19 Ganz similarly argues that Plaintiffs’ seventh cause of action under New York’s
20 Consumer Protection From Deceptive Acts and Practices statutes should be dismissed for
21 failure to state a claim because Plaintiffs fail to allege that the challenged act or practice was
22 consumer oriented. Similar to the law in Illinois, under New York law, the “statute’s consumer
23 orientation does not preclude its application to disputes between businesses per se, but it does
24 severely limit it. ... The threshold requirement of consumer-oriented conduct is met by a
25 showing that ‘the acts or practices have a broader impact on the consumer at large’ in that they
26 are ‘directed to consumers’ or potentially affect similarly situated consumers.’” *Cruz v. NYNEX*
27 *Information Resources*, 703 N.Y.S.2d 103, 107 (2000) (citations omitted).

1 Again, Plaintiffs fail to allege injury, impact or direction to consumers or to the public
2 interest. The complaint merely states a legal conclusion that “Defendants’ acts and practices, as
3 alleged herein were: consumer oriented as Plaintiff and Class members could not supply
4 consumer demand, among other things; materially deceptive or misleading to a reasonable
5 person or consumer, and had a broad impact on consumers at large an the public interest.” (See
6 Compl. at ¶ 165.) Again, the Court finds such conclusory allegations to be insufficient to
7 establish the requisite consumer orientation as required under New York law. Accordingly, the
8 motion to dismiss count seven under New York’s Consumer Protection From Deceptive Acts
9 and Practices statutes is GRANTED with leave to amend to establish a sufficient factual
10 predicate.

11 CONCLUSION

12 For the foregoing reasons, the Court GRANTS Defendants’ motion to dismiss with
13 leave to amend. Plaintiffs shall file an amended consolidated complaint, if any, by March 12,
14 2010. Defendants shall have twenty days thereafter to file their responsive pleading.

15 IT IS SO ORDERED.

16 Dated: February 17, 2010

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18 JEFFREY S. WHITE
19 UNITED STATES DISTRICT JUDGE
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